

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAREN D. CROWE)	
Claimant)	
VS.)	
)	
KATHY'S PLACE)	Docket No. 1,010,424
Respondent)	
AND)	
)	
INSURANCE COMPANY UNKNOWN)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Fund appeals the October 8, 2004 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits after the Administrative Law Judge (ALJ) determined that claimant was permanently and totally disabled from employment. The Appeals Board (Board) heard oral argument on March 15, 2005.

APPEARANCES

Claimant appeared by her attorney, E. L. Lee Kinch of Wichita, Kansas. Respondent did not appear. The Kansas Workers Compensation Fund appeared by its attorney, Andrew E. Busch of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. However, the parties were advised both prior to the oral argument before the Board and at the time of the oral argument that

Deposition Exhibit 7,¹ which was described in the record as Dr. Drazek's entire chart, was not contained in the record presented to the Board. As the chart of Dr. Drazek has not been provided to the Board, even though requested, Deposition Exhibit 7 to Dr. Drazek's deposition was not considered by the Board during its deliberations and decision in this matter.

ISSUES

1. What is claimant's average weekly wage for her September 18, 2002 date of accident?
2. What is the nature and extent of claimant's injury and disability? More particularly, is claimant permanently totally disabled or is she limited pursuant to *Pruter*² to two scheduled injuries for the injuries suffered on September 18, 2002?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant worked for respondent as a waitress in its restaurant in South Haven, Kansas. At the time of the regular hearing, claimant was 60 years old, with an 11th grade education and no GED. During the 15 years preceding the accident, claimant had worked as a waitress at various restaurants and as a cashier at a local food center.

On September 18, 2002, claimant sustained an accidental injury arising out of and in the course of her employment when she slipped on a wet floor and fell, landing on her head, left arm and left leg. As a result of that fall, claimant suffered a left distal tibial fracture, a left trimalleolar ankle fracture and a left distal radius fracture. She underwent an IM tibial nailing, a left open reduction and internal fixation of the left lateral malleolus, a closed reduction and percutaneous pinning of the posterior malleolus, and external fixation of the left distal radius. This all occurred on October 3, 2002, under the care of orthopedic surgeon Charles D. Pence, M.D.

Claimant was discharged from the hospital on October 5, 2002, and thereafter periodically examined by Gonzalo H. Sanchez, M.D. She was also examined by

¹ Drazek Depo., Ex. 7.

² *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

orthopedic surgeon Bruce R. Buhr, M.D. She last saw Dr. Buhr on July 21 or 22, 2003, and was released at that time without restrictions.

Claimant was referred to Dr. Drazek by her attorney for an examination on September 10, 2003. The above described injuries and surgery were consistent with the findings contained in Dr. Drazek's report. Dr. Drazek assessed claimant an 18 percent impairment to the left upper extremity for combined loss of grip strength to the left upper extremity and loss of range of motion at the wrist. This was all done pursuant to the *AMA Guides*.³ The Board notes that Dr. Drazek, in her report, discusses the *AMA Guides* and testifies regarding the use of the *AMA Guides* in her deposition. At no time, however, does she verify that she utilized the fourth edition of the *AMA Guides*,⁴ which is mandated by statute.⁵

Dr. Drazek does, however, pinpoint the basis for the impairment to a loss of strength to the left upper extremity and loss of range of motion in the wrist. As Table 34, which is identified by Dr. Drazek, in the third edition (revised) of the *AMA Guides*⁶ deals with relationships of impairments of the second through fifth toes to the impairment of the foot, it is obvious that chart was not considered by Dr. Drazek in assigning loss of grip to the left upper extremity and loss of range of motion to the wrist. Table 34 in the fourth edition of the *AMA Guides* does, however, deal with upper extremity impairment for loss of strength. The Board, therefore, extrapolates from the information provided by Dr. Drazek that it was, indeed, the fourth edition of the *AMA Guides* which she utilized in rendering her opinion. Counsel are reminded that a specific reference to which edition of the *Guides* was utilized would be recommended in the future.

Dr. Drazek placed specific restrictions on claimant, including no lifting in excess of 40 pounds, no repetitive lifting in excess of 20 pounds, with repetitive gripping to the left hand limited to one-third of the workday, with no prolonged standing or walking greater than approximately one hour at a time. Dr. Drazek recommended claimant should alternate standing and sitting on an as-needed basis. In assessing the task list prepared by vocational expert Doug Lindahl, Dr. Drazek found claimant incapable of performing fourteen of the fifteen tasks, for a 93 percent task loss. She acknowledged that the "no" checked beside most of the tasks dealt with the need for constant standing, which, while claimant can stand on a regular basis, Dr. Drazek found the alternating standing and sitting recommendation to be appropriate. When asked whether she felt that claimant was

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

⁵ K.S.A. 44-510e(a).

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (3rd ed. rev.).

permanently and totally disabled, Dr. Drazek confirmed that she did not believe claimant to be permanently and totally disabled.

Claimant was examined, at her attorney's request, by board certified orthopedic surgeon Edward J. Prostic, M.D., on March 29, 2004. Dr. Prostic assessed claimant a 12 percent impairment to the left upper extremity and a 15 percent impairment to the left lower extremity, both ratings pursuant to the fourth edition of the *AMA Guides*.⁷ He agreed with Dr. Drazek's assessment of claimant's task loss after reviewing Mr. Lindahl's report. Dr. Prostic also restricted claimant from constant standing or walking and would recommend that she walk or stand no more than 45 to 50 minutes in an hour, with allowed breaks. He also restricted claimant to limited squatting or climbing and advised she would have difficulties on uneven surfaces and going up and down stairs or attempting to squat or kneel. Additionally, he found claimant unable to make a tight grip with her left upper extremity, although he did not believe that that would cause claimant any loss of function as a waitress. Dr. Prostic was not specifically asked if claimant was permanently totally disabled and did not testify to that fact, although he did return her to work with specific restrictions.

Claimant was examined by vocational expert Doug Lindahl, who reviewed her work history, education and medical history. He found claimant very limited in her ability to perform jobs, both in south central Kansas and Flagler County, Florida, which is where claimant relocated.

Claimant relocated from Braman, Oklahoma, where she lived at the time of the injury, to Flagler County, Florida, where her daughter lived. Initially, claimant had planned on assisting her daughter in her daughter's business, which involved painting, sealing and overcoating driveways. However, that business did not work out. Claimant testified that she was seeking employment in Florida, checking want ads in a publication called the Penny Saver and applying at local businesses. She also testified that her daughter was going to take her to a government agency which assisted in job search efforts.

With regard to claimant's wage, she testified that she was being paid approximately \$200 per week as a salary. This information was verified by claimant's employer, Kathy Sprueill (the owner of respondent Kathy's Place). Claimant also testified that she was earning tips as a waitress. When asked to estimate, claimant opined she was making approximately \$411 per week in tips. Ms. Sprueill, in providing income information from Kathy's Place, opined that the yearly income was approximately \$152,000 in the year 2002, which, when multiplied times 15 percent, results in a maximum tip average of approximately \$22,800. If claimant's estimate of her tips at \$411 per week is accurate, that would indicate she was receiving \$21,372 per year in tips, leaving slightly over \$1,400 in

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

tips per year to be shared among the other waitresses. Claimant initially testified that she did not keep a record of her tips, but later testified that she did have some written materials to verify the amount of tips that she earned. However, this information was never placed into evidence.

Placed into evidence were claimant's tax records for the years 2001 and 2002. In the year 2001, claimant earned \$8,585 which, by her testimony, included tips. This, when computed over a 52-week period, resulted in a wage of \$165.10 per week, including tips. Claimant's records for 2002, which showed income through September 18, 2002 (the date of accident) comprising 37 weeks, totaled \$5,118. Claimant testified that for the year 2002, she did not include her tips in her income records. This, when calculated over the 37 weeks before claimant's accident, results in an average weekly wage of \$138.32 per week, not including tips. This equates to a differential of \$26.78 per week for the period including tips when compared to the period not including tips.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁸ The ALJ determined that claimant was essentially and realistically unemployable, citing *Wardlow*.⁹

In this instance, the Board finds that the record does not support a finding that claimant is essentially and realistically unemployable. Dr. Prostic examined claimant, placing specific restrictions on her. Dr. Prostic, however, did not testify that claimant was permanently and totally disabled, indicating in his testimony and his report that claimant retains certain job functions which she can perform. Dr. Drazek also provided claimant with specific restrictions and, when asked whether claimant was permanently totally disabled, testified that, in her opinion, claimant was not permanently totally disabled. Additionally, claimant acknowledged when she moved to Florida, it was with the intent of assisting her daughter in her daughter's driveway resurfacing business. The fact that that business did not work out does not diminish claimant's intentions. Additionally, while in Florida, claimant was utilizing the Penny Saver to seek the local jobs. She was also applying at various places, although unidentified, and testified that her daughter was taking her to a government agency which would assist her in her job search. Claimant's testimony does not support a finding that, in her own mind, she was permanently totally disabled, as she was actively seeking employment in Florida. The Board, therefore, finds the ALJ's reliance on *Wardlow* to be misplaced, as in this instance claimant is not essentially and realistically unemployable.

⁸ K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

⁹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

With regard to the nature and extent of claimant's injury, the Board must next look to the Kansas Supreme Court's policies set forth in *Pruter*. In *Pruter*, the court found that the scheduled injury statute, K.S.A. 44-510d, is not an exception to the general disability statute contained in K.S.A. 44-501e, but rather precedes the general disability statute. The court went on to quote K.S.A. 44-510e(a), which states:

(a) . . . [E]xcept that in case of temporary or permanent partial general disability **not covered by such schedule**, the employee shall receive weekly compensation as determined in this subsection Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and **which is not covered by the schedule** in K.S.A. 44-510d and amendments thereto. (Emphasis added.)¹⁰

The court went on to note that K.S.A. 44-510d states the general rule for injuries to scheduled members, distinguishing the rule found in *Honn*,¹¹ which had been utilized to find a general body impairment when dealing with loss of use of parallel limbs caused by simultaneous injuries. In this instance, claimant's injuries are to nonparallel limbs, involving the left upper extremity and the left lower extremity. The court, in *Pruter*, in considering a claimant who suffered injuries to her right arm and right leg, while acknowledging that a presumption existed to constitute permanent total disability, went on to find that that presumption was rebuttable. If the presumption was rebutted, then a claimant with the nonparallel limb injuries would be limited to an award based upon a calculation under K.S.A. 44-510d involving two scheduled injuries. The Board finds, in this instance, claimant is not permanently totally disabled. She is, therefore, limited by *Pruter* to two scheduled injuries under K.S.A. 44-510d.

Dr. Drazek and Dr. Prostic both assessed impairments to claimant's left upper and lower extremities. Dr. Drazek assessed claimant an 18 percent impairment to the left upper extremity, with Dr. Prostic assessing claimant a 12 percent impairment to the left upper extremity. Dr. Drazek assessed claimant a 10 percent impairment to the left lower extremity, with Dr. Prostic assessing claimant a 15 percent impairment to the left lower extremity. The Board finds there is no justification in this record to give greater weight to one opinion over that of the other and, therefore, averages the opinions of the doctors, assessing claimant a 15 percent impairment to the left upper extremity and a 12.5 percent impairment to the left lower extremity for the purposes of this award.

With regard to claimant's average weekly wage, the Board finds claimant's contention that she earned \$411 per week in tips to be unsupported by the record. It is difficult to imagine that claimant would share the responsibility of waitressing with two other

¹⁰ *Pruter*, *supra*, at 873.

¹¹ *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

waitresses, with claimant claiming over 90 percent of the tips from respondent's business. Additionally, claimant's tax information does not support claimant's contention that her income from tips suddenly escalated dramatically from her previous waitressing experiences. Claimant's wages from 2001, when compared to those from 2002, show only a \$26.78 variation in wages for the time claimant reported her tips when compared to the time claimant did not report her tips. The Board, in computing claimant's average weekly wage, will give claimant the benefit for the difference between the two wage records, finding claimant's allegation of a \$411-per-week tip average to be less than credible. The Board, therefore, finds claimant's average weekly wage to be \$226.78 for the period of time she was employed with respondent and will compute claimant's award accordingly.

The Board notes claimant was paid 44 weeks temporary total disability compensation with no indication in this record for which injuries the temporary total disability benefits were paid. As claimant underwent surgery both to her left upper and left lower extremities, the Board will divide the temporary total disability compensation equally between the two injuries pursuant to K.S.A. 44-510d in computing the award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated October 8, 2004, should be, and is hereby, modified, and claimant is awarded benefits for the injuries suffered on September 18, 2002, for a 15 percent impairment to the left upper extremity and a 12.5 percent impairment to the left lower extremity and based upon an average weekly wage of \$226.78.

Based upon an average weekly wage of \$226.78, claimant is entitled to 44 weeks of temporary total disability compensation at the recalculated rate of \$151.19 per week totaling \$6,652.36, followed by 26.7 weeks of permanent partial disability compensation at the rate of \$151.19 per week totaling \$4,036.77 for a 15 percent functional impairment to the left forearm, and also 21 weeks permanent partial disability compensation on a functional basis at the rate of \$151.19 totaling \$3,174.99 for a 12.5 percent functional impairment to the left lower extremity, for a total award of \$13,864.12, all of which is due and owing at the time of this award and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
Kathy Sprueill d/b/a/ Kathy's Place, Respondent
Andrew E. Busch, Attorney for the Fund
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director